

SEDGWICK COUNTY
BOARD OF ZONING APPEALS

MINUTES

March 8, 1999

The regular meeting of the Sedgwick County Board of Zoning Appeals was held at 3:30 p.m. on March 8, 1999, in the County Commission Room, 3rd Floor, Sedgwick County Courthouse, 525 N. Main, Wichita, Kansas.

The following members were in attendance: Chairman, GARY WILEY; PAM BAUER; JANA MULLEN and GRANT TIDEMANN.

The following Planning Department staff members were in attendance: Secretary, DALE MILLER, and Recording Secretary, ROSE SIMMERING.

Also present were Glen Wiltse, County Zoning Administrator, George J. Bloesing, County Code Enforcement and Michelle Daise, Assistant County Legal. Roger D. Hughey, Attorney for County Board of Zoning Appeals. Ken Woodard, County Appraiser.

WILEY: Called meeting to order at 3:30 p.m. Before we begin I must declare a conflict of interest in this case some of my property is very close to Mr. Shelinbarger. Does anyone from staff or from the public here today, have any objections to my hearing this case? Seeing nobody we shall proceed. Swearing in of all persons present that will give testimony behind the podium. Dale are you presenting?

MILLER: No, the impression that I had was that it was pretty much the same issue as the previous case. It is just on a different piece of property.

WILEY: I suppose we need to start with County Law.

DAISE: I believe the burden is on the applicant, Mr. Shelinbarger.

HUGHEY: Counsel for CoBZA....speaking to Board.

WILEY: Well, that is what I am thinking, that somebody needs to indicate where we are at on this particular case. I guess I can do that.

DAISE: It is my understanding that what we are dealing with here today is, an appeal of a decision made by the Zoning Administrator, Mr. Glen Wiltse. Mr. Wiltse had issued a letter to Mr. Shelinbarger on his property located on West 79th Street. Basically, at this time, Mr. Shelinbarger, is appealing that decision, by the Zoning Administrator. That decision is relating

to the condition on his property of inoperable vehicles and his claim that they should be exempt from the zoning laws, because of what he claims to be an agriculture nature on his property. That is my understanding of the basic summary of what we are hearing today.

WILEY: Mr. Shelinbarger, would you care to present your case please.

ROY E. SHELINBARGER, 300 W. 79th Street South: I am before you today to appeal. This is what my understanding of what the appeal is and it is a little different from Ms. Daise's definition. It is an appeal of the Zoning Administrators decision that the keeping of inoperable vehicles on the property on 300 West 79th Street is not an agriculture use and therefore is not an exempt use from the code. I believe that the Administrator's interpretation is in error. Because the location and the use of the property qualifies it for the agriculture exemption as provided for in Article I, general provision of the Wichita-Sedgwick County Unified Zoning Code and by the definition of Agriculture in Article II, "rules of construction and definitions." The agriculture exemption clearly states, "this code shall not apply within the unincorporated area of the county for the use of land for agriculture purposes, or to the erection or maintenance of buildings thereon; provided that such land and buildings are used for agriculture purposes. Residential uses that are accessory to agriculture uses shall be considered agriculture in nature for the purposes of this exemption and farm residences shall thus be exempt from the requirements of this code." As written, this exemption does not allow the Zoning Administrator to apply the code to the property in question. The Zoning Administrator's letter of November 24, 1998, acknowledges the existence of the agriculture exemption but does not specifically say that the exemption does or does not apply. That is a critical branch of the decision process that the Zoning Administrator can not ignore. The letter simply applies Article II definitions, in an attempt to apply the code regardless of the exemption existence. Another point that I have is that the property is also classified agriculture for real estate appraisal purposes. I have a current evaluation notice from just this year that identifies it as "Class A"; improvements on lands devoted to agriculture use and "Class F", residence on farm home sites. The issue is not if the keeping of inoperable vehicles on the property, constitutes an agriculture use. Is the property used for agriculture purposes? Once you answered that question, yes or no. If the answer is yes, and the property is used for agriculture purposes then the code can not be applied. The inoperable vehicles is essentially, if it exist on property in the unincorporated area of the county that is used for agriculture purposes. This code can not be applied to prescribe that activity. That is what I really think the issue is. I believe that case law supports the fact that you do not consider, what is on the property or what is going on with it, what the accessories or personal property is on the property. It is what is the property used for? Also Kansas Statue 12-758 says, "the regulations shall not apply to existing use of building or land." The land in this case and the use of the land has changed since the time that I bought the land in 1989. The land originally was unfenced, and it is now currently field fenced. It has gates and provision to retain livestock on the property. There are out buildings on the property that have existed for a long time that have been used and keeping of fowl and other animals. The property is approximately 10 acres and the portion that is fenced would be 7 1/2 acres. I think that is consistent with what the Appraiser has parceled it or allocated it as. The property is also used as a watershed. There is a pond on the property. There was a reconstruction of the dam and the spillway done in 1992, to improve the watershed capability of the property. There has been various forestry activities and associated things like woodcutting. Posts have been cut on this property out of some of the

Osage Orange trees to be used for construction of fences not only on this property, but also on another property that I own or was involved with. I believe that the appraisal records also show on this property, that the appraiser considers the land devoted to agriculture use per the records and per KSA 79-1476. I would also like to point out, that case law supports, construing the zoning regulations broadly in favor of the property owner. Even though the burden is on me to contest or bring this matter before you, and to show that the Administrator is in error. I believe both you and the Administrator are supposed to look at the issue and the facts in this case. If there is a question one way or the other on the regulation, that the regulation and the interpretation of the regulation is suppose to be construed broadly in favor of the property owner. That is the citation of that case in COBBLE VS the CITY OF FAIRWAY 189 Kansas 710 -1962. In this case, the issue is if the property is used for agriculture purposes. I am saying that the zoning code can not be applied to the property for inoperable vehicles. It is irrelevant whether the keeping of inoperable vehicles is an agriculture use or not. If the property is used for agriculture purposes in other ways the chance that there is inoperable vehicles on the property has no bearing on how the Administrator should be interpreting the code. It is my understanding per KSA 12-759E, when deemed necessary by the BZA, the Board may grant variances and exceptions from the zoning regulations on the basis and in the manner herein after provided. Part II of that E2 "and to grant exceptions to the provisions of the zoning regulations, in those instances where the Board is specifically authorized to grant such exemptions and only under the terms of the zoning regulations. In no event shall exceptions to the provision to the zoning regulation where the use or exception contemplated, is not specifically listed as an exception in the zoning regulation. Further, under no conditions shall the BZA have the power to grant an exception when the conditions of this exception as established in the zoning regulations by the governing body are not found to be present." I believe that an exception can be granted by this Board, it already exists in the zoning code, it already exists in Article I of the zoning code, it is called the "agriculture exemption". I am asking that you move to set aside the Administrative Interpretation and apply the agriculture exemption to the property. I am asking that based on the historical use of the property you could also invoke the code's transitional provision of non-conformity created by adoption of the code. I would like to enter into evidence these records from the Appraiser's Office. They identified the agriculture classification.

WILEY: Are there any questions of Mr. Shelinbarger? Is anyone else here that would like to speak on Mr. Shelinbarger's behalf? I would like to state that before we get started that a letter was sent to Mr. Keith Gooch, February 18, 1999, referencing this case and they opposed the request by Mr. Shelinbarger, to approve the zoning. That letter is from V.M. Howell at 7618 South Seneca. I would like to read that in. Those that would be in support of the determination that were sent in.

DAISE: As counsel for Code Enforcement, I have asked a couple of other individuals to come and try and clarify some issues relating to these appraisal records that you have in front of you, as well as the conditions of the property. Ken Woodard, is here from the Appraisers Office. George Bloesing, is here from Code Enforcement and Glen Wiltse is here as well. I would like to make some final arguments when they are through speaking if that would be appropriate.

WOODARD: In 1997, I was an employee of the Agriculture Division of the County Appraiser's Office. In 1997, Mr. Shelinbarger came to us with a request to reduce the value of

his land based on the flooding situation. We acknowledged that happened because of the development of land north of him in Haysville. So we reduced that land which used to be a rural residential rate, we moved it to a farm situation to give him a reduction that was not covered under residential. What we did we found some ground to cover ourselves that was deemed agriculture. Not because he was farming it. It was to cover us in case the state came in and ask "Why was this land changed from residential to farm?" So we changed it. It did go up in value. He protested that, and took it to the County Commission who reduced the land and reduced his value even further. We agree that the land and his property should be reduced. We did not do it because he was farming it. There was no farming done on his land. There is some grassland that we could use to cover ourselves in case the state came down. That is one reason why we did this. He claims that he has farm buildings on the land. If you look at the sheet that he gave you that says Agriculture Rural Residential Data Collection Card, on the back of that document in category 700 to 710 you will see that there is RG1, RS1, RT2, there are three of those. Those are all residential properties that have nothing to do with the agriculture situation on the land. Those pertaining to the house that the land sits on. Those are garages and utility sheds; those are all pertaining to the house. Nothing on there pertains to the agriculture land. That is why that land was changed to farm. Not because he was farming it, because we have not found anything that he is farming it for it still has grassland on there. But that is the reason that we did change it. I just wanted to clarify that situation.

WILEY: Are there any questions of Mr. Woodard? Thank You Sir.

BLOESING: How I became involved in this case, we received a complaint about the inoperable vehicles and commercial vehicles on Mr. Shelinbarger's property. I went and made an inspection of the property and when I made an inspection of the property I observed, four commercial vehicles that are readily seen from the road. The actual vehicles are 1) GMC pick-up truck, 2) International truck without a bed on the back of it, 3) International truck without a bed on the back of it, 4) Mazda hatch back vehicle, no tag on it, 5) Commercial type of truck that you would use to change tires on commercial vehicles out on the highway. It is an International truck as well. I have copies of photographics of the vehicles that I am talking about, I will give those to you here in a minute. After I went down and observed the property, none of the five vehicles that are on the property have current tags on them. I have another set of pictures, where there is a tree that has grown up between the tires and grew around the tire of the vehicle showing that vehicle, in my opinion, has not moved for at least three years. Because of the way the tree has grown up between the tire and the frame on that car. What I did after I went back to our office, Mr. Shelinbarger, was notified by certified mail that he had inoperable vehicles and commercial vehicles on his property. It was sent certified mail, Mr. Shelinbarger received or the date of delivery of that letter was on October 31, 1998. Then on November 30, 1998, at 11:57 a.m., I went back to the property and all vehicles that were there from when I notified them by the letter were exactly in the same spot. None of them had been moved. On that date there was a citation issued for inoperable vehicles and stored commercial vehicles on that property. I have copies of the actual citation, the letter that was sent to Mr. Shelinbarger, and a copy of him receiving certified mail. Does anyone have questions?

WILEY: Thank You George. Were there four vehicles?

BLOESING: Five vehicles, four commercials and one demolished.

GLEN WILTSE, DIRECTOR DEPARTMENT OF SEDGWICK COUNTY CODE ENFORCEMENT, COUNTY CODE ADMINISTRATOR: In looking at the original question as to whether this applies to agriculture exemption or not, basically, what the agriculture exemption says is that we can not apply zoning to basically the use of the land. This is a use to the land to the extent that he is storing inoperable vehicles. These vehicles serve no agriculture purpose that we can see at this time. We have been given no proof to indicate that there is any agriculture use on the land either. The other issue with inoperable vehicles is that the way the zoning code is set up, there are very few places in the zoning code that you can have inoperable vehicles. That is like vehicle storage zoning or like salvage yards and that type of thing. That is really the basis for my interpretation, is that the inoperable vehicles are not allowed even if this was an agriculture type use of land. Any questions?

WILEY: If somebody did purchase a vehicle that was inoperable and they had planned on restoring it or something would they not have the opportunity to do that?

WILTSE: The way the zoning code is set up the vehicles has to be moved every 72 hours. They can be placed inside, but they can not store them outside.

WILEY: I just wanted to get that clarified. Questions of Glen? Do you see this as any different than the case that we had a month ago with Mr. Shelinbarger, on 87th? And this is "SF-20" zoning district verses the "RR" zoning district.

WILTSE: No difference in cases. I believe that zoning is correct.

WILEY: Thank you.

DAISE: I agree with Mr. Wiltse, that, this is very similar to the last case that we had before you a little over a month ago. One thing that Mr. Shelinbarger has raised is that it is somewhat different than the last property. The Appraisers Office has considered this and has changed things. Mr. Woodard indicated that there is some farm residential property. What I want to clarify is that one department's determination of this farm residential appraisal is not binding on the Zoning Administrator in determining whether or not something is allowed on that property. Mr. Woodard even indicated in his statements that he did not see any type of farming going on that property. What they looked at was just that area of native grass and felt that they could use that to cover themselves in giving Mr. Shelinbarger a break on his taxes. Mr. Shelinbarger also made an argument that if you determine that something is agriculturally used if the property has any agriculture use on it basically anything goes. He is incorrect. That Zoning Code, the Kansas Statue, and the Supreme Court of Kansas have all made it very clear that it is the use of the land that is at issue. Even if he had proven, which my position is that he has not proven or given any evidence today that there is an agriculture use on that property. But, even if he had, the area where these inoperable vehicles are being stored is not being used for an agriculture purpose. Kansas Statue even indicate, that zoning regulations shall not apply to the use of land for agriculture purposes, so long as the land and the buildings thereon, are used for agriculture purposes and not otherwise. I think that it is very clearly based on these gentlemen's testimony

that the storage of inoperable vehicles is not an agriculture purpose. It is our position that Mr. Shelinbarger has not shown enough evidence to show that actually there is an agriculture purpose, or that these inoperable vehicles are being used for an agriculture purpose. One other thing that Mr. Shelinbarger mentioned briefly was a motion that the historical use of this property be considered and declare this a non-conforming use. He presented no evidence as to the historical use of this property as being a non-conforming use. This is something we discussed last time, that in order for a use to be considered non-conforming and be allowed to continue, it must have been legal at the time zoning laws went into effect. The policy behind that is to allow something that was legally existing to continue for productive use. He has presented no evidence of that, certainly storage of inoperable vehicles would be quite a stretch to indicate that was for a constructive purpose having those on that property. I would just ask that you uphold Mr. Wiltse determination that this is not exempt as an agriculture use, and that you just uphold his determination. Thank You.

WILEY: Questions? Anyone else to speak?

SHELINGBARGER: Am I allowed to respond to certain facts they presented?

WILEY: Yes, you are.

SHELINBARGER: It is not a true statement that there are no tags on the vehicles, or no current tags, for at least one of those vehicles has a current tag. The commercial vehicle that Mr. Bloesing referred to is a 1968 International; it is what used to be known as a BF Goodrich farm service truck. It has been in my family since 1972. It has been used for hauling post, hauling wood, and hauling a number of items that are used for fencing property-moving wood around. It has a boom-winch on the back. Culverts can be hauled in that truck. Some of the culverts that were installed on the property for a dike and a modification to the reconstructed damn or actually moved from the loading point, they were unloaded in the ditch in the front of the property and they were hauled in on the side using that truck as a an implement to move the culverts. These culverts were 30 feet long, they are 18 inches inside and I would venture to say they weigh easily 300 to 400 pounds. That truck was used, a couple, two of those, end to end, the culverts would become 60 foot long in an assembled fashion and were bolted together, using that truck to hold it together. That truck was actually used to move the culverts in a position where they could be placed in the damn modification. There is another truck there, it is not a GMC pick-up it is a 1-½ ton pick-up, it has an antique tag on it that is by definition a current tag. That truck has been used for the refurbishing of the buildings and hauling wood and things around on that property. Also, used for hauling rock and riprap and things like that for spillways and for dam reconstruction purposes. I was married until 1996; my wife and I had a twenty-five acre farm that was basically, a portion of it was a rock quarry in Winfield, Kansas. Those vehicles were used to haul various materials back and forth. Both used for landscaping and for installing rock and things on the property associated with the dam. Also, wood and post and things were hauled back and forth between the two places. Even though I am not willing to concede that you have to show that the vehicles themselves are used for agriculture purposes in order to qualify for the exemption, the fact is that those vehicles are being used for that and have been used for that in the past.

WILEY: Any questions of Mr. Shelinbarger? Just one. You say that two out of the five are tagged. One antique tag and then the boom truck is also a tagged vehicle?

SHELINBARGER: At the time that Mr. Bloesing inspected it he took a picture. I believe that shows the Mazada car does not have a tag. The tag was inside the vehicle. That car was broken but it was tagged. It can be made to run. I have chosen to quibble over what is an operable or not operable. Supposedly, you can put a battery in one, if you can get it to run. It is a car that time that he cited me, it was operable, and it was tagged at that time. I will admit today that it does not have a current tag. There are two vehicles that have current tags as of right now.

WILEY: It is my understanding, to qualify these vehicles they do have to be moved ever 72 hours. Evidently, they are not?

SHELINBARGER: No. I guess that is in the code. I do not recall seeing it in the code. I am talking about this section.

WILEY: There is. You are looking at zoning ordinances.

SHELINBARGER: You know there are a number of people down in that area if you want to go out and mark tires and see if everyone is rolling there cars every 72 hours you are going to have a huge police department.

WILEY: Questions? I make a motion that the Board recess for Executive session to discuss the evidence submitted and that we will return no later than 4:30 to review this case.

TIDEMAN: Seconds.

MOTION CARRIES 4-0.

WILEY - RE-CONFINE: We are just a little early. Are there any objections to reconvening? I see that everybody has returned. What would be the wishes of the Board?

MULLEN: I would like to make a motion, I believe that there has not been persuasive evidence of agriculture use of this land, and that no evidence of it's use before zoning were effective as to this property. According to the ruling of the Zoning Administrator I believe that it is upheld.

TIDEMAN: Seconds.

CARRIES 4-0.

WILEY: Appointment of new secretary to the replace Dave Yearout who has resigned. I would like to make a motion that we appoint Dale Miller as Secretary to the County Board of Zoning Appeals.

TIDEMAN: Seconds.

CARRIES 4-0.

Adjourned 4:29 p.m.